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U. S. Department of Agriculture

INDIANA STATE MILK CONTROL ACT

PAPER NO. 1. Series on State Milk Control Acts, Dairy Section,
Agricultural Adjustment Administration, United States Department
of Agriculture. December 24, 1936.

This is one of a series of papers designed to make available, in a condensed and convenient form, information concerning State milk control acts, the type of regulations issued thereunder, and, in general, the legal developments in connection with their administration and enforcement. One paper will be devoted to each State having such an act.

It is expected that a general summary of all the State acts and regulations will be prepared when the review of individual State acts and regulations is completed. In this connection some comparison may be made. These papers omit much detail which might be helpful to those concerned with legislative or administrative problems of State milk control. Those who desire more complete information will undoubtedly find it to their advantage to get in touch with the officials charged with the administration of these acts.

STATE MILK CONTROL IN INDIANA:
THE ACT, ITS ADMINISTRATION AND LEGAL STATUS

PART ONE

I. General Character of Legislation.

The Indiana Milk Control Law 1/, approved March 12, 1935, is an emergency measure declaring that "the production, transportation, processing, storage, distribution and sale of milk 2/ . . . is a business affecting the public health and interest." Objectives include the procuring and maintaining of an adequate supply of pure and wholesome milk, the safeguarding in the public interest of the normal process of producing and marketing milk, the promoting of its orderly marketing through producer cooperative associations, and the removal of unfair or destructive trade practices. Cooperation with the authorities of other States and the Federal Government is authorized. The emergency period extends to July 1, 1937, after which the provisions of the act shall not apply, unless the General Assembly shall otherwise provide.

Type of Governing Agency

A Milk Control Board, consisting of five members appointed and removable by the Governor, is, in certain respects, a part of "The Division of Agriculture." Producers and distributors are equally represented on the board, with the Commissioner of Agriculture as chairman. The producer and distributor representatives are appointed from nominees submitted by their respective organized groups.

Subordinate to the board are local milk committees, representative of producers and distributors selected by the board for the purpose of making recommendations to it with respect to rules and regulations, advising with producers and distributors, and otherwise assisting in the enforcement of the act. The members serve without compensation but may employ such assistance as may be necessary.

Conditions Under Which Powers of Board May be Exercised

The board may exercise its powers upon its own initiative, except that resale prices are to be fixed only upon the basis of a declared

1/ The act is known as chapter 281 of the Acts of the General Assembly of the State of Indiana for 1935.

2/ By definition, "milk" means milk of dairy animals prepared "with a view to being sold as fluid milk, and also cream, buttermilk and skimmed milk sold, or intended to be sold, as such for human food, including such part of this milk as is sold or manufactured as surplus milk."

emergency in an area and on request of 30 percent of the distributors by number distributing 70 percent of the milk by volume, or on request of 70 percent of the distributors by number representing 30 percent of the volume. An alternative method is available to encourage self-regulation, whereby the board may approve agreements entered into by producers and producer-cooperatives and distributors through the assistance of local committees.

Source of Financing

The activities of the board are financed through annual license fees required to be paid by distributors, producer-distributors, and distributing brokers. Such fees are held in a special fund and are available for all expenses of the board. Check-weighing and testing and other marketing services rendered under the direction of local committees are financed by approved deductions from producer payments.

Statutory Protective Provisions

Preservation of the validity of the act is sought, first, by the usual separability clause, and second, by a provision stating that none of its provisions shall be deemed to apply to interstate or foreign commerce except as it may be permitted by the Federal Constitution, Acts of Congress, or Treaties.

II. Regulatory Provisions.

Investigation, books, and records.- The board may itself or through an agent investigate all matters pertaining to production, transportation, storage, distribution, and sale of milk in the State. This power is supported by the authority to administer oaths, issue subpoenas, compel attendance and submission of books and accounts, and have entry to any place where milk is produced or handled, and to inspect all pertinent and material books and records anywhere within the State. Verified reports may be required covering all information pertinent to the board's regulations. Such information is required to be kept confidential and for the exclusive use and information of the board except as it may be used in an action or proceeding where the board is a party.

Licensing powers.- All dealers within the State are required to be licensed within a specified time upon submission of specified information to the board. The board may, after having given due notice and opportunity for hearing, decline to grant, or may suspend or revoke a license, upon its own motion or a complaint in writing filed by any interested person, when satisfied of the existence of facts specifically enumerated in the act. Failure, without reasonable cause, to make prompt payment for milk bought from producers, violation of sanitary regulations,

unsatisfactory evidence of financial responsibility, when required, are among the enumerated grounds for revocation.

Bonding of distributors.- Milk dealers, in making application for a license, are required either to submit a bond in form and amount satisfactory to the board or a financial statement showing satisfactory evidence that the applicant is able to insure prompt payment for a sixty-day supply of milk. Exception is made of a cooperative selling milk to a milk dealer but not in case a cooperative assumes the role of a distributor.

Cooperation with other authorities.- The board has the power to confer and cooperate with the legally constituted authorities of other States and the United States in order to secure a uniform system of milk control, in connection with which it may conduct joint hearings and issue joint or concurrent orders and exercise all its powers under the law.

Provisions in Regard to Price Regulation

Prices to be paid producers.- The board may fix minimum prices to be paid to producers by all licensed dealers under any of the following procedures: (1) upon its own initiative; (2) by approval of schedules filed by distributors; (3) by approval of prices arrived at by "agreement" by two or more distributors and one or more cooperatives or between such distributors and groups within the same market upon which a hearing has been held and other conditions of the act having been complied with; (4) by the approval of price schedules adopted or recommended by local milk committees.

Minimum prices fixed shall be "just and reasonable" and in their determination the board shall be guided by "the cost of production including compliance with all sanitary regulations in force in such market or markets, the value of milk in terms of its basic products, butter, cheese and evaporated milk, the supply of milk in such market or markets and the welfare of the general public." With respect to prices arrived at through an agreement, the board must find that the terms of the agreement are fair, equitable and in the public interest.

Minimum prices may apply to each grade, quantity and class of milk, subject to reasonable differentials for quality and location, and must be uniform as among licensees in the same market. Transportation and other charges may also be the subject of rules and regulations and be considered in price differentials.

Payments to producers; types of pool; base rating.- Under the provisions of the act the following is authorized: (1) Classified buying of producers' milk and (2) pooling and averaging of all returns from sales of fluid milk by producers in a given marketing area, and the payment to all such producers of a uniform pool price, subject to

equitable deductions. The so-called "market-wide" (equalization) pool or the "individual distributor" pool may be operated, either under an "agreement" or under an order issued directly by the board.

The base-rating plan of payment may also be used in conjunction with either type of pool pursuant to the power of the board to determine a portion of the product of the entire herd of the producer which shall be accepted and paid for subject to such price or prices as the board may establish.

Resale prices.- The board may fix resale prices if it finds after investigation either on its own initiative or upon complaint, (1) that an emergency exists in any marketing area and that there is danger that application and enforcement of the act will be jeopardized, and (2) that the proper request by distributors has been filed. (See PART ONE, "Conditions Under Which Powers of Board May Be Exercised.") The duration of the "emergency" period is to be determined by the board. The resale price fixed must be "fair and equitable."

Powers with Respect to Unfair Competition and Trade Practices

No schedule of unfair trade practices is set forth in the act, although the power to prohibit them logically arises from the declared purpose of the act to promote orderly marketing and thus to eliminate unfair and demoralizing trade practices. Such powers may also be inferred as incidental to other specifically enumerated powers.

Limitations and Exceptions

Among the limitations set forth in the act are (1) the provision requiring the application by distributors, under requirements as to their number and the volume of their distribution, before the board may establish resale prices in any marketing area, and (2) the provision that the act shall not be applied to prevent the sale of raw milk otherwise complying with the act. Three important additional limitations or exceptions are: (1) the act shall not be construed as repealing or modifying any provision of law in respect to requirements imposed by health authorities or other public agencies; (2) cooperatives shall not be prevented from making collective sales, blending the net proceeds of sales of various classes of milk, whether of milk as defined by the act or otherwise, and whether within or without the State^{3/}; and (3) surplus milk may be sold by a licensed dealer or producer cooperative to any unlicensed person for manufacturing purposes, "and such unlicensed person shall not be subject to any obligation or regulation under this act."

^{3/} See "Status of Cooperative Associations of Producers", page 6.

Violation

Unlawful acts.- The following acts are declared unlawful: (1) For any person to perform any functions of a milk dealer except as provided in the act; (2) to buy milk from or sell to an unlicensed milk dealer unless permitted to do so by the board or handle milk which he has reason to believe has been dealt with in violation of the act 4; (3) for any milk dealer or cooperative in a marketing area to buy milk from producers except according to regulations of the board for such area, or for less than the price fixed or approved by the board; (4) for any producer to sell or deliver milk to any unlicensed dealer or to any milk dealer for consumption in any area, except for at least the price approved by the board for that area and unless it has been produced in accordance with applicable health regulations and the rules and orders of the board.

Penalties.- The act provides that any person who violates any of its provisions, or any lawful rule or order of the board, shall be liable in the penal sum of not to exceed \$1,000, and that each day's violation of any such provision, order or regulation shall constitute a separate offense.

Enforcement and Legal Remedies

Board.- The board may seek enforcement by injunction, mandamus or any other appropriate remedy in the court of record having jurisdiction of the subject matter, with no requirement to file bond or show that there is no other legal remedy available. The Attorney General and county prosecuting attorneys are required to represent the board. The judge of any circuit or superior court is given jurisdiction to compel obedience to subpoenas issued by the board in like manner as subpoenas issued by the court.

Aggrieved parties.- Notice by the board through registered mail or personal service and opportunity for hearing is a prerequisite to refusal to grant or revoke a license.

Any person affected by any rule, regulation, order or decision of the board may within thirty days after its issuance obtain (1) judicial review before the circuit or superior court of any county having jurisdiction of the subject matter, and (2) relief, if the court is of the opinion that the action of the board was unlawful, or unreasonable. In such appeals the board may require the appellant to deposit in advance, an amount sufficient to pay the cost of the record. Any stay of execution granted by the court is subject to the requirement that the appellant shall issue a satisfactory security bond to cover all damages arising from or caused by the delay in the effectiveness or enforcement of the order complained of. An appeal may be taken from such lower court to the appellate court of Indiana under rules governing such appeals in civil cases.

4 Except as provided in clause (3) under "Limitations and Exceptions".

Status of Cooperative Associations of Producers

The policy of the State is to encourage the marketing of milk through producer cooperative associations.- A cooperative association organized under the Indiana Acts of 1925 and 1931, or under the similar acts of adjoining States, and admitted to do business in Indiana, may make collective sales, blend proceeds of such sales among members and make deductions in accordance with member contracts; it may not return any rebates, directly or indirectly, to a distributor to whom it sells milk which would have the effect of reducing the dealer's net cost for milk bought from such cooperative. However, its purchases of milk from producers and its sales must be in accordance with rules and regulations issued by the board.

A qualified cooperative may be made the agency of the board to conduct market-wide pools and render marketing services for which deductions from payments to producers are authorized. The approval or disapproval of the association is recognized as the approval or disapproval of its individual members. While access to the books and records of the cooperative is not clearly set forth, the investigatory powers of the board would appear ample, particularly where the cooperative is engaged in distribution.

PART TWO

Administrative Procedure, Rules, Regulations and Official Orders

The following portion of the outline will deal with the manner in which regulations have been developed under the act.

Persons subject to regulation.- Independently of regulations applicable to designated marketing areas, each milk dealer in the Spring of 1935 was required to secure a license by submitting an application and detailed information requested by the board and, in the case of a distributor, the surety bond or satisfactory evidence of ability to pay producers.^{5/}

In addition to the general licensing requirement, milk dealers are required to abide by the regulations established for particular marketing areas in which they do business.

The producer is brought under the authority of the act in designated areas through the establishment of minimum prices he may receive for milk, the pooling method adopted, and the use, in a majority of cases, of a base-rating or "producer quota allocation" plan.

Areas.- To date^{6/}, 15 "marketing areas" have been designated and are operating under the authority of the board and its agencies the local milk

^{5/} Except in the case of retail stores which are not required by the act to pay a license fee.

^{6/} September 22, 1936.

committees, cooperative associations of producers, or local market administrators.^{7/} Most of the marketing areas are designated by counties such as "Blackford County Marketing Area," although the area itself is seldom coterminous with county lines. The areas designated are: Bartholomew, Blackford, Clark, Clay, Decatur, Elkhart, Ft. Wayne, Grant, Howard, LaPorte, Marion, Putnam, St. Joseph, Vanderburgh and Wayne. The actual boundary lines are fixed appropriately to the size of the fluid milk marketing areas. The cities of Columbus, Hartford, Jeffersonville, Brazil and Clay City, Greensburg, Elkhart, Ft. Wayne, Marion, Kokomo, LaPorte, Indianapolis, Greencastle, South Bend, Evansville and Richmond are the principal ones operating under milk regulations. The total population in these urban areas approximates one million, perhaps one-third of the entire population of the State.

Market-wide pools; producer bases.- Market-wide pools have been established by orders and regulations in the Clark, Elkhart, Marion, St. Joseph and Vanderburgh County marketing areas and in the Ft. Wayne marketing area. Producer quotas are likewise established in all of the above areas except Ft. Wayne,^{8/} and in addition are included in the orders or regulations governing the Clay, LaPorte, Putnam and Wayne County marketing areas.

Classification for purposes of price determination.- The definition of classes varies somewhat from market to market. In all the marketing areas, except in the Fort Wayne and the Vanderburgh County (Evansville) marketing areas, three classes of milk are established. In these two there are four classes^{9/}. A typical classification upon which prices to dealers are established is as follows:

Class I - shall include all milk sold, and all milk, the cream from which is sold as fluid cream in bulk or bottles, at wholesale or retail.

Class II- shall include all milk used in the form of chocolate milk or chocolate drink or other flavored milk or milk drink, buttermilk, cottage cheese, condensed milk, evaporated milk, powdered milk, and milk the cream from which is used in the manufacture of ice cream or ice cream mix, or stored for the purpose of making ice cream mix.

Class III- shall include all milk used for purposes other than Class I and Class II.

Variations in classifications include, under Class III milk, all milk, the cream from which is used or sold for use in the manufacture of butter ^{10/}.

^{7/} In each area there is a "market administrator" appointed by the board.

^{8/} Producer quotas are being introduced in Ft. Wayne with the next order being issued concurrently with one to be issued by the Federal Government.

^{9/} The number of classes in Ft. Wayne is being reduced to three under the joint regulation by the State and Federal Government.

^{10/} Thus classified in orders of the board for the Elkhart and the St. Joseph County Marketing Areas.

When resale prices have been established they have been made applicable to the following classes or grades of milk, although all of these classes are not found in the order governing any one marketing area: Milk (standardized, natural raw, pasteurized, Vitamin D, special breeds or premium, homogenized, malted, and orange), goat milk, chocolate drink, buttermilk (plain, creamed, cultured and Golden Flake), cream (coffee, whipping, and sour), skim milk, cottage cheese (creamed or otherwise), cream cheese and dry cheese.

Trade practices.- Some trade practice provisions are found in the orders which govern each of the 15 milk marketing areas in Indiana. Frequently, the local milk committee formulates such provisions but they may also be established through a marketing agreement. In several cases "Codes of Fair Practices" (resale) are made a part of the order. An example of what is probably the maximum trade practice declaration by this code method is found in the code for the Marion County (Indianapolis) Marketing Area, which states that the following shall be considered unfair:

1. To use any method or device, whether directly or indirectly, which would have the effect of paying the producer prices less than those established pursuant to the act or the rules and regulations of the board.
2. To divert or attempt to divert in any manner, whether directly or indirectly, any of the customers, patronage, or good will of another milk dealer by any method or device which is not approved by the local milk committee and the administrator, other than by constructive methods of salesmanship and advertising.
3. To fail to cooperate in all constructive, organized programs of the milk industry or any branch of the industry which have for their purpose either increasing the consumption of milk, reducing the cost of handling milk "and/or" milk products between the producer and the consumer, or promoting the milk industry generally.^{11/}

In addition to practices specified in the orders as being unfair, the act declares others to be unlawful. In many instances these unlawful acts are similar to those frequently included under the category of unfair trade practices. In some of the board's orders the practices forbidden are associated entirely with resale transactions.

Records and reports.- Distributors and their respective affiliates and subsidiaries are required severally to keep books and records that will clearly reflect "their financial transactions and the true condition of their respective businesses." They are required to make reports to the board from time to time, either for the purpose of aiding the board in furtherance of its general powers and duties, or with respect to specific operations governed by the terms of an order, rule or regulation. Both the

^{11/} This provision is qualified by the provisos that such program be approved by persons "representing not less than sixty percent (60%) of the normal milk production and not fewer than ten percent (10%) in number, and sixty percent (60%) in amount of milk handled by distributors in the Marketing Area," and that such program be not contrary to law.

board and its representatives, including the local market administrator, have the right to examine such books and records.

Hearings.- General regulation No. 1 provides that when a proposed agreement is filed and if the board believes that the marketing area affected is ready for a hearing, it shall call a hearing and issue notice to all interested persons. The hearing is conducted by members of the board or such persons as the board may designate, and is for the purpose of securing a public record of all pertinent facts and information necessary as a basis for the issuance of a regulation.

PART THREE

Legal Status

Litigation.- The authority of the Milk Control Board has been generally sustained by the courts. Litigants have usually alleged the unconstitutionality of the act or the regulations. One case involving resale prices was brought in a Federal court^{12/}, but was dismissed because the amount in controversy was less than that required in order to give the court jurisdiction.

The most important case was that involving producer-distributors of South Bend who had refused to take out licenses as required by the act^{13/}. Among the provisions challenged were the following: The authority of the board (1) to have access and entry to books, papers and records; (2) to determine and designate natural marketing areas; (3) to allot producer bases; (4) to establish reasonable trade practices; (5) to provide for market-wide pools; (6) to provide for deductions from payments made by distributors to producers; and (7) to fix minimum prices either to be paid producers or to be charged at retail or wholesale.

The constitutionality of the act was sustained by the lower court, except that it applied the rule of the Seelig case and ruled that the Milk Control Board "has no power to prescribe, fix or regulate the minimum price to be paid to producers of such milk" as is procured by Indiana dealers from States other than Indiana.

Act upheld by State Supreme Court.- The Supreme Court of the State handed down its decision in this case sustaining the constitutionality of the act in every important respect, on March 26, 1936. The chief points considered were as follows: (1) Sufficiency of the title of the act; (2) Is the act in violation of certain provisions of the Indiana State Consti-

^{12/} Kroger Grocery and Baking Company vs. Milk Control Board. In Equity No. 623 in the District Court of the U. S. for the Northern District of Indiana, South Bend Division. Decisions rendered July 29, 1936.

^{13/} In the St. Joseph Superior Court No. 2, Milk Control Board v. Frank Albert and Delbert Schafer; in the State Supreme Court, Frank Albert, et al v. Milk Control Board.

tution? e. g. the right to be secure against unreasonable search and seizure; (3) Is the penalty for violation of the act too severe?; (4) Does the act violate Article 14 of the Amendments to the Federal Constitution (the so-called "due process clause")?; (5) Is there an unconstitutional delegation of legislative authority?; (6) May the board itself institute legal proceedings?; (7) Is the declared emergency still existent?

The court pointed out, however, some inconsistencies or errors in the law. First it denied the power of the legislature (a) to compel the appellate court to decide a case appealed to it within ninety days, and (b) to provide that in the absence of such decision, the judgment or decree of the court below so appealed from shall be conclusively deemed to be affirmed. The Supreme Court concurred with the lower court with respect to the lack of control over milk originating outside the State.

In affirming the judgment of the lower court, the Supreme Court in conclusion said:

"As heretofore stated the Milk Control Act of Indiana is very similar, and, in many respects, identical with the Milk Control Acts of New York and New Jersey. Doubtless, the authors of the Indiana Act had these acts before them when they wrote the Indiana Act, and followed them to a large extent. The New York Act has been held, in the case of *Nebbia v. People*, supra, constitutional by the Supreme Court of the United States, and the New Jersey Act, in the case of *State v. Newark*, 179 Atl. 116, has been held constitutional. While all the questions presented in the instant case were not presented in these cases, the fundamental principles are the same in all -- the power of the legislature to regulate and control the production, transportation, processing, storage, distribution and sale of milk for human consumption.

"We have not quoted at length from the New York and New Jersey cases. To have done so would have unduly extended this opinion. The New York case was decided by the highest judicial tribunal of our land. These decisions alone are sufficient to justify the affirmance of the instant case. We are satisfied that no federal or state constitutional provision questioned by appellant is violated in the instant case and we find no available error."